Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-864

# In the Supreme Court of the United States

OCTOBER TERM, 1985

DA-CHUAN ZHENG AND KUANG-SHIN LIN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

BEST AVAILABLE COPY

# In the Supreme Court of the United States

OCTOBER TERM, 1985

---

No. 85-864

DA-CHUAN ZHENG AND KUANG-SHIN LIN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

---

Petitioners contend that the court of appeals erred in vacating an order dismissing an indictment.[1]

On February 23, 1984, petitioners were charged in an indictment returned in the United States District Court for the District of New Jersey with conspiracy to violate the Arms Export Control Act, 22 U.S.C. 2778, by arranging for the export of traveling wave tube amplifiers without a license. Traveling wave tube amplifiers constitute "active and passive countermeasures" or "counter-countermeasures," which are defense articles designated on the United States Munitions List, 22 C.F.R. 121.1 Category XI(a)(1);

---

[1]The petition was filed on October 28, 1985, more than 60 days after the court of appeals denied rehearing on August 27, 1985 (Pet. App. 10a-11a). It therefore appears to be out of time under Rule 20.1 of the Rules of this Court.

unauthorized export of defense articles is prohibited by the Act. On July 26, 1984, the district court dismissed the indictment on the ground that the Munitions List does not comply with the Act, which authorizes the President to designate "items" as defense articles. Pet. App. 12a-20a; 590 F. Supp. 274. In the district court's view, " '[c]ountermeasures' is simply too broad a description to be considered an 'item.' " Pet. App. 15a.

The court of appeals vacated and remanded for further proceedings. Pet. App. 1a-7a; 768 F.2d 518. The court of appeals reasoned that " 'items' is a relative term whose contours are constructed by context" and that "the President should be given wide latitude in interpreting the delegation of authority" to designate items on the Munitions List. Pet. App. 6a. The court concluded that, given the legislative history of the Act and the context of Category XI of the List, which includes "highly specialized electronic equipment used for particular military purposes," the terms " 'countermeasures' and 'counter-countermeasures' are appropriate designations of 'items' for inclusion on the Munitions List." *Id.* at 7a.

Petitioners contend (Pet. 15-47) that the indictment is defective because "countermeasures" is not an "item" within the meaning of the Act, the Act violates the nondelegation doctrine, and the List is unconstitutionally vague. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[2] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted

---

[2]It is now over 21 months since the return of the indictment and almost 17 months since the district court's order. Interlocutory review at this time would cause additional delay in the trial of the charges against petitioners.

following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

DECEMBER 1985

---

[3]Because this case is interlocutory, we are not responding to the merits of the questions presented by the petition. We will file a response on the merits if the Court requests.